Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR CORPORATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

No. 76-528

CONSUMERS POWER COMPANY, *Petitioner,*

v.

NELSON AESCHLIMAN, et al., *Respondents.*

SUPPLEMENTAL STATEMENT OF FACTS OF RESPONDENTS

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SUPPLEMENTAL STATEMENT OF FACTS

The following facts, not formally part of the record of this case, but matters of public record, are crucial to the Court's analysis of the issues presented for review in this case.

1. The Vermont Yankee nuclear power station has now been granted a full-term operating license. The opinion of the court below remanded Vermont Yankee's original operating license, pending further pro-

ceedings in the generic waste rulemaking that was held inadequate in the same decision. Subsequently, as noted in respondents' brief (Br. at 23-24), the Nuclear Regulatory Commission ("Commission") promulgated an "interim" rule for consideration of the environmental effects of nuclear wastes in the licensing of nuclear power stations.

Thereafter, the Commission was asked by an intervenor to rescind entirely the license that had been granted to Vermont Yankee. In the opinion attached to this filing, the Commission rejected this request. Applying the Commission's interim rule, the opinion stated the Commission's view that the environmental hazards of nuclear wastes were insufficient to overcome the expenses made on the already-completed plant. The time for seeking court review of that decision has expired, and no Petition for Review has been filed.

2. As noted in respondents' brief (Br. at 24), the Commission commenced a new rulemaking proceeding to assess anew environmental questions held by the Court of Appeals to have been inadequately assessed in the Commission's previous rulemaking. 42 *Fed. Reg.* 26987 (May 26, 1977). The purpose of this new rulemaking is to establish new estimates of the environmental effects of certain elements of the uranium fuel cycle, based on a fuller record. The procedures established for this rulemaking provide for greater participation by the public than those of the rulemaking overturned by the Court of Appeals' decision.

We request that the Court consider these facts in focussing on which, if any, issues remain for the Court to review in this case.

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APPENDIX

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Cite as 6 NRC 25 (1977) ALAB-421

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARDS

Michael C. Farrar, Chairman (Docket 50-271)*
Alan S. Rosenthal, Chairman (Dockets 50-443 and 444)
Dr. John H. Buck
Dr. Lawrence R. Quarles (Docket 50-271)**

In the Matters of

Docket No. 50-271
VERMONT YANKEE NUCLEAR POWER CORPORATION
(Vermont Yankee Nuclear Power Station)

Docket Nos. 50-443, 50-444
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

(Seabrook Station, Units 1 and 2)

July 18, 1977

In response to ALAB-392, 5 NRC 759 (April 21, 1977), an intervenor filed a motion seeking (1) a determination that the values in the interim S-3 tables tip the cost-benefit balance of the Vermont Yankee and Seabrook facilities in favor of abandonment; and (2) certification to the Commission of the question of whether the interim S-3 tables

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* Mr. Farrar is also a member of the Appeal Board in Dockets 50-443 and -444.

** Dr. Quarles participated in the deliberations on the matters considered in this opinion and indicated his general agreement with the conclusions which are reached herein. He did not, however, review the final version of the opinion.

should be used in light of the President's recent policy statements concerning nuclear power. The Appeal Board (1) finds no compelling reason to certify the intervenor's question to the Commission and hence denies that request; (2) determines that the cost-benefit balance for Vermont Yankee is not tipped in favor of abandonment of the facility by the environmental impacts quantified in the interim fuel cycle rule; and (3) reserves for its decision on the merits of the pending *Seabrook* appeals the fuel cycle issues relating to that facility.

Rules of Practice: Appellate Procedure

The Appeal Board exercises its authority to certify a question to the Commission under 10 CFR § 2.785(d) sparingly. Absent a compelling reason, it will decline certification.

Messrs. John A. Ritsher, Thomas G. Dignan, Jr., and R. K. Gad, III, Boston, Massachusetts, for the Vermont Yankee Nuclear Power Corporation and Public Service Company of New Hampshire, *et al.*

Mr. Anthony Z. Roisman and Mrs. Karin P. Sheldon, Washington, D.C., for the New England Coalition on Nuclear Pollution.

Messrs. Joseph F. Scinto, Myron Karman and Edwin J. Reis for the Nuclear Regulatory Commission staff.

Memorandum and Order

By its order of April 1, 1977,[1] the Commission directed us to determine the impact of its just promulgated interim fuel cycle rule[2] on the environmental cost-benefit balances which had been struck for each of ten nuclear facilities

[1] CLI-77-10, 5 NRC 717.

[2] The interim rule issued on March 14, 1977. 42 Fed. Reg. 13803.

specified in that order. As the first step in the carrying out of that direction, we entered our own order three weeks later[3] in which, *inter alia*, we announced that we would entertain further submissions by a party or parties with respect to any of either those ten facilities or three other facilities which still had uranium fuel cycle questions pending before us. The submissions were to "be confined in scope to an assignment of reasons why, in light of the interim rule, the cost-benefit balance for the facility or unit in question tips, or might tip, in favor of abandonment of the facility." 5 NRC at 765.

The only party which accepted that invitation was the New England Coalition on Nuclear Pollution, an intervenor in the licensing proceedings involving the Vermont Yankee and Seabrook facilities.[4] Its filing was not, however, restricted to the impact of the interim rule (and, more particularly, the numerical values assigned in revised Table S-3 for the spent fuel reprocessing and waste disposal phases of the fuel cycle) upon the cost-benefit balances for those reactors. Rather, although contending that application of the interim rule would tip the balance against both Vermont Yankee and Seabrook, the Coalition's primary point is that we should certify to the Commission the following question.

> Should the cost-benefit balance for individual reactors be restruck using the interim S-3 Table values issued on March 14, 1977, in light of the statement by President Carter on April 7, 1977, that the fuel cycle scenario upon which those values were based is being indefinitely deferred?

[3] ALAB-392, 5 NRC 759 (April 21, 1977).

[4] The staff and licensees filed papers setting forth their views on certain questions relating to the application of the interim rule which had been posed in ALAB-392 on behalf of some Appeal Panel members. These questions are addressed in Mr. Farrar's concurring opinion, *infra*.

By way of elaboration, the Coalition tells us that

> On April 7, 1977, and again on April 20, 1977, the President of the United States announced as national policy the indefinite deferral of any plutonium recycling, thus effectively cancelling the fuel cycle scenario upon which the current interim S-3 Table is based. Legal principles, logic and national policy dictate that the Appeal Board not go through the essentially meaningless process of evaluating the impact on the cost-benefit analysis for an individual facility of the interim S-3 Table which is based upon a fuel cycle scenario which is inconsistent with the decision of the President of the United States.
>
> The documents underlying the interim S-3 Table, NUREG-0116 and 0216, include brief discussions of some fuel cycle options which do not include plutonium recycle. However, only the S-3 Table itself is adopted as the rule and that Table does not include any analysis of the no recycle scenario. In addition, both NUREG-0116 and 0216 candidly admit that the data on the no-recycle scenarios is seriously defective.

Responses to the Coalition's submission were filed by the applicants/licensee in the two proceedings and the NRC staff. Those parties oppose the certification request and also disagree with the Coalition's assessment of the impact of the interim rule upon the cost-benefit balances for these facilities.

A. Although our authority to certify a question to the Commission is beyond doubt (10 CFR § 2.785(d)), we have more than once observed that "such authority should be exercised sparingly." See *e.g. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-211, 7 AEC 982, 984 (1974); *Consolidated Edison Co. of New York* (Indian Point Nuclear Generating Station, Unit 3), ALAB-186, 7 AEC 245, 246 (1974) and cases

there cited. Thus, "[a]bsent compelling reason, we will decline to certify a question to the Commission." ALAB-211, *supra*, 7 AEC at 984.

A compelling reason for certification is not discernible here. It is an absolute certainty that the Commission is fully aware of the statements of the President upon which the Coalition relies. And we may fairly presume that, if it were of the view that those statements affected in some manner the continuing validity of its interim uranium fuel cycle rule, the Commission would have initiated itself the appropriate steps to bring about the necessary revisions. The ink on the interim rule was barely dry when the President announced on April 7 his policy looking to an indefinite deferral of "the commercial reprocessing and recycling of the plutonium produced in U. S. nuclear power programs." It is thus scarcely likely that the Commission's memory of the content of the interim rule had by then dimmed to such an extent that any bearing which that new policy might have had on the rule would have been overlooked.[5]

B. As the Coalition of necessity acknowledges, Vermont Yankee is a fully constructed and operating reactor. If its abandonment at this juncture would—or even might—necessitate the construction of some alternative generating

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[5] Both the companies and the staff challenge the correctness of the Coalition's premise that the interim rule does not encompass the option of no recycling of plutonium. We are pointed to the statement in footnote 1 to Table S-3 to the effect that:

> The contributions from reprocessing, waste management and transportation of wastes are maximized for either of the 2 fuel cycles (uranium only and no recycle).

Although this statement would appear to undercut the ground assigned for the certification request, we prefer to rest our denial of the request on the considerations which we have set forth in the text above.

facility in order to meet power demands, revocation of its operating license could not possibly be justified by the environmental impacts of the uranium fuel cycle as quantified in Table S-3 of the new interim rule. When the then Atomic Energy Commission promulgated the original Table S-3 in 1974, it characterized those impacts as "relatively insignificant." See ALAB-392, *supra,* 5 NRC at 760. Although the interim rule now in force has brought about some revisions in the portions of the table relating to the spent fuel reprocessing and waste disposal phases of the fuel cycle, in its April 1 order (CLI-77-10, *supra*) the Commission took pains to

> . . . restate our belief, expressed in the statement of considerations accompanying the interim rule, that the values in the old rule and those in the interim rule are not substantially different and, therefore, although conceivable, it appears unlikely that use of the interim rule values rather than those in the original rule could tilt a cost-benefit balance against a facility, thus requiring suspension of an outstanding license or permit, or denial of a permit that would otherwise have been approved.

5 NRC at 717b. On the other hand, heavy economic costs (and perhaps environmental ones as well) would attend upon the construction of the substitute facility. Additionally, there would be the matter of fulfilling power demands pending completion of that facility—which also might well bear, at minimum, a high price tag.

The Coalition tells us, however, that there is no current need for the power that is being generated by Vermont Yankee. It relies on a January 1, 1977, report of the New England Power Pool (NEPOOL) for the proposition that, were the generating capacity of Vermont Yankee to be unavailable from now until 1980, New England would still

have adequate reserve margin to meet its needs.[6] In this connection, the Coalition insists that, because of what it considers to be a present "national policy that nuclear power should be used as a last resort," the continued operation of Vermont Yankee cannot be justified on the basis that it might serve as a substitute for an existing fossil fuel generating plant.

The licensee's rejoinder is that it appears from an affidavit of the Chief Engineer of the Vermont Public Service Board submitted to the Licensing Board last September[7] that a six-month shutdown of Vermont Yankee would increase the cost of electrical energy to Vermont Yankee's wholesale customers in Vermont by an amount approaching $24 million and to New England ratepayers in total by approximately $50 million. The licensee also disputes that the President's announced policy forecloses the use of nuclear facilities for the purpose of conserving petroleum. For its part, the staff has appended to its response to the Coalition the affidavit of Richard E. Weiner, an electrical engineer in its Antitrust and Indemnity Group who is responsible for "coordinating and conducting in-depth analys[es] of the planning, operating and coordinating functions of many types and sizes of electric utilities throughout the country." According to Mr. Weiner, oil-fired units would have to be used to make up the lost generating capacity of Vermont Yankee. This would entail an economic penalty in terms of increased costs of approxi-

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[6] The Coalition regards the post-1980 need for the facility to be "speculative."

[7] Affidavit of Gordon B. Stensrud, dated September 30, 1976, attached to the memorandum of law filed by the State of Verment on the same date in response to the Licensing Board's order of August 13, 1976. In that memorandum, Vermont opposed the suspension or modification of the Vermont Yankee operating license pending the promulgation of a new interim fuel cycle rule.

mately $186,000 per day and an additional daily consumption of 19,000 barrels of oil.

We need not pass judgment here on the precise degree of accuracy of these estimates. It is enough to conclude, as we do, that the environmental impacts assigned by the interim rule to the uranium fuel cycle are far too small to justify the summary elimination of more than 500 MWe in existing generating capacity. In this regard, we do not understand the President to have decreed as a matter of national policy, either in the statements upon which the Coalition relies or elsewhere, that already constructed and operating nuclear facilities are now to be abandoned in favor of other nonnuclear energy sources (which may not even be presently available).

In thus holding that Vermont Yankee's status as a fully built facility is determinative here, we do not overlook the fact that the Natural Resources Defense Council sought unsuccessfully to raise uranium fuel cycle issues with regard to this facility as far back as 1971. See ALAB-56, 4 AEC 930 (1972). But even then it was too late in the day, for the facility had been essentially constructed and was in an operating license proceeding. Stated otherwise, had the interim rule been in place in 1971 and applied to Vermont Yankee at that time, the result necessarily would have been the same as that reached today. Thus, the passage of time has not been prejudicial to the Coalition.

C. In contrast to Vermont Yankee, the Seabrook facility is still in the early stages of construction. It is also still before us on the appeals taken from the initial decision of the Licensing Board authorizing the issuance of construction permits. LBP-76-26, 3 NRC 857 (1976). Because several of the issues which remain to be decided on those appeals relate to the NEPA cost-benefit balance for Seabrook, it is appropriate that we consider and decide the fuel cycle question along with them.

For the foregoing reasons, we (1) *deny* the Coalition's request for certification; (2) *determine* that the cost-benefit balance for Vermont Yankee is not tipped in favor of abandonment of the facility by the interim fuel cycle rule; and (3) *hold* for our decision on the merits of the pending *Seabrook* appeals the fuel cycle issues relating to that facility.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

Margaret E. Du Flo
Secretary to the Appeal Board